UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re	Case No. 92-5-3651-MM
GOCO REALTY FUND I,	Chapter 11
Debtor.	**MEMORANDUM DECISION**

INTRODUCTION

This matter comes before the Court upon the Application of the Debtor, GOCO Realty Fund I, a California Limited Partnership, ("GOCO"), for authority to employ the law firm of Bartko, Tarrant & Miller, P.C., f/k/a Bartko, Welsh & Tarrant or Bartko & Welsh (the "Bartko Firm"), as special litigation counsel to represent its interest in litigation against New West Federal Savings and Loan Association ("New West"), a secured creditor (the "Application"), and the opposition of New West to that application (the "Opposition"). The issue that arises is whether the Bartko Firm should be disqualified from representing GOCO based on its prior representation of New West's predecessor in interest. A motion by GOCO to stay discovery in the pending litigation is also under consideration at this time. The relevant facts are as follows.

FACTS

The Debtor is a newly formed entity formerly known as Glenborough Operating Company, Ltd., which consisted of the various Glenborough limited partnerships consolidated in 1986 and controlled and operated by Robert Batinovich. Various affiliated Glenborough companies and limited

partnerships originated during the period from 1982 to 1984 primarily to participate in a real estate investment program with American Savings and Loan Association, f/k/a State Savings and Loan Assocation, ("ASLA") to purchase ASLA's growing inventory of REO property under favorable financing terms. The Glenborough partnerships purchased property from private parties as well. ASLA made separate loans to the Glenborough partnerships in connection with these purchases.

The evidence shows that the Bartko Firm acted as real estate counsel for ASLA in at least ten of these real estate financing transactions with the Glenborough partnerships during the period from 1982 to 1984. The evidence also demonstrates that these were complex real estate transactions requiring extensive documentation and that the Bartko Firm was compensated in the amount of at least $231,282.00 by ASLA for the time the Bartko Firm expended in representing ASLA on these matters. The Bartko Firm also represented the former president and chairman of ASLA, J. Foster Fleutsch, in the defense of suits alleging mismanagement and lender liability .

It became apparent to both the Glenborough partnerships and ASLA in 1985 that many of these loans by ASLA were distressed. Therefore, these loans were renegotiated in 1986 to provide for cross-collateralization, consolidation of loans, and additional security to ASLA, among other accomodations from both parties. All of the Glenborough partnerships were consolidated into one entity in 1986. The 1986 loans were restructured again in 1987 into one loan. ASLA was represented in these two restructures by Adams, Sandler & Hovis and Feldman, Waldman & Kline. Declaration of Frank Austin at 2 (attached to Reply Memorandum in Support of Application to Appoint Special Litigation Counsel). The terms of the restructured loan include the release of GOCO on the original loans.

ASLA was declared insolvent in September 1988, and its assets were transferred to a newly created entity, American Savings, a federal savings and loan association ("American Savings"). In December 1988, the Federal Home Loan Bank Board (the "FHLBB") appointed the Federal Savings and Loan Insurance Corporation (the "FSLIC") as receiver for American Savings. On December 27, 1988, the FHLBB authorized the formation of two new federally chartered savings and loan associations, American Savings Bank ("ASB") and New West. Webb v. Superior Court of the State of California, 225 Cal.App.3d 990, 995, 275 Cal.Rptr. 581, 582 (Cal.App.2 Dist. 1990). The

FHLBB thereafter authorized the FSLIC to transfer substantially all of the assets and liabilities of American Savings to either ASB or New West. See Declaration of Nanda Y. De Roes (attached to the Opposition by New West). Thus, New West was created and acquired ASLA's interest in the GOCO loan.

The GOCO loan continued to be troubled notwithstanding the 1987 restructure. GOCO and New West continued to negotiate extensively regarding the terms of the loan. In connection with those negotiations, Robert Batinovich prepared a 15-page document dated November 6, 1990 and entitled "The Relationship of Glenborough and American Savings". The document addresses from the point of view of the controlling principal of GOCO the following: 1) the relationship between the parties to the loan; 2) the evolution of the loan; 3) and the manner in which the parties arrived at their respective positions as of November 1990. Mr. Batinovich wrote,

> The present relationship of Glenborough Operating Co. Ltd. (also known as GOCO or the MLP) and American Savings (ASLA), which is the predecessor in interest to New West Federal Savings (New West), is an outgrowth of a relationship that began in 1982.

Mr. Batinovich proceeded to discuss the history of the relationship, devoting 6 of the 15 pages to the events and relationship between Glenborough and ASLA during 1982 to 1984. During this period of negotiation, the parties also entered into a Memorandum of Understanding in 1991.

However, on May 21, 1992, New West filed suit against GOCO in Orange County, and GOCO filed suit against New West in San Mateo County (collectively, the "State Court Actions"). New West is pursuing judicial foreclosure of all of the Debtor's assets securing the loan, specific performance, injunctive relief, and the appointment of a receiver. GOCO is pursuing recovery based upon the 1986 and 1987 restructure and the terms of the 1991 Memorandum of Understanding pursuant to contract law and partnership law, among other theories. GOCO alleges in its complaint that New West is the "successor in interest to [ASLA]...with respect to the transactions that are at issue in the lawsuit." San Mateo Complaint ¶ 3. The San Mateo suit has been removed to this Court.

The issues in the State Court Actions involve the respective interests of New West and the Debtor in partnership assets the value of which is disputed. The evidence will include, at a minimum, testimony by former employees of ASLA regarding the negotiation of the 1986 and 1987 restructured

loan agreements, the negotiation of the 1991 Memorandum of Understanding, and the subsequent course of conduct of the parties. Declaration of John J. Bartko in Support of Application to Employ Special Counsel at 3.

The Debtor filed its voluntary Chapter 11 petition on May 21, 1992, the same day that the State Court Actions were filed. In a letter dated June 5, 1992, Roger S. Greene, General Counsel for New West, raised with John Bartko the issue of disqualification of the Bartko Firm based upon the firm's knowledge of confidential information acquired during its representation of ASLA and requested that the Bartko Firm withdraw from representation of GOCO. John Bartko replied to Mr. Greene by letter dated June 12, 1992, wherein Mr. Bartko summarized the history of the relationship between the Bartko firm and ASLA, expressed the conviction that there is no "substantial relationship" between the Bartko Firm's prior representation of ASLA and its current representation of GOCO, and declined to withdraw. Mr. Bartko invited further dialogue to resolve the differences but received no reply. The instant Application was filed on July 9, 1992.

The Application sets forth that the Bartko Firm has "no known connection with any parties in interest or their attorneys, nor represent an interest materially adverse to the proper representation of [Debtor] or to the interests of the estate, except as may be set forth in the declaration..." Application at 3. The Declaration of John J. Bartko in Support of Application to Employ Special Counsel ("Declaration of John J. Bartko 1") filed in compliance with Bankruptcy Rule 2014 sets forth that "New West is the successor by purchase and sale from the government to some of the assets once owned by American Savings, a former client of [the Bartko] firm.... Neither I nor any member of this firm provided any legal services in connection with the negotiations or drafting of [the 1986 and 1987 loan] agreements and I believe the claims which are the subject of the litigation described in this declaration are not substantially related to our prior employment by American Savings in the period preceding the fall of 1984." Declaration of John J. Bartko 1 at 4-5.

The declaration also disclosed the Bartko Firm's representation of the former president and chairman of ASLA, J. Foster Fluetsch, in the defense of suits by ASLA and others which asserted broad ranging claims of mismanagement. Id. at 5. However, the declaration failed to disclose that the Bartko Firm had been joint venturers with ASLA in a business venture during the mid-1980's,

although that information is reflected in the June 12, 1992 letter attached to the declaration as Exhibit 2. In the Declaration of John J. Bartko attached to the Reply Memorandum in Support of Application to Appoint Special Litigation Counsel ("Declaration of John J. Bartko 2"), after the issue had already been raised by New West, the Bartko Firm further disclosed that it represented Mr. Fluetsch in litigation in which ASLA was a codefendant in matters involving claims of lender liability. Declaration of John J. Bartko 2 at 2. ASLA paid the Bartko Firm for its representation of Mr. Fluetsch pursuant to an agreement to indemnify.

John Bartko's June 12, 1992 letter to Roger Greene, which is attached as Exhibit 2 to the Declaration of John Bartko 1, states, "Neither I, this firm, nor any lawyer in this firm has ever represented New West." Although the Bartko Firm disclosed its former representation of ASLA in general terms, no where in its Application has the Bartko Firm disclosed to this Court its direct involvement in the preparation of the loan documents for ASLA on the original GOCO loans that were the predecessor loans to the 1986 and 1987 restructured loan that is the subject of the State Court Actions.

DISCUSSION

A. Standing of New West to Assert Conflict of Interest

As an initial matter, GOCO has challenged New West's standing to assert that the Bartko Firm has a conflict of interest in connection with its representation of GOCO in the State Court Actions. As authority, GOCO has cited the cases of FDIC v. Amundson, 682 F.Supp. 981 (D. Minn. 1988), and SMI Industries Canada Ltd. v. Caelter Industires, Inc., 586 F.Supp. 808 (N.D.N.Y. 1984), to support its argument that one who takes an asset by purchase or assignment does not have standing to assert attorney disqualification.

The Amundson case referred to the FDIC acting in its corporate capacity as a liquidator, 682 F.2d at 987, and not in its capacity as receiver, which takes control as new management and succeeds to the institution's attorney-client privilege. See In re Financial Corporation of America, 119 Bankr. 728, 736 (Bankr. C.D. Cal. 1990). However, as pointed out by counsel for New West, the Financial Institutions Reform Recovery and Enforcement Act ("FIRREA"), effective August 1989, eliminated

the distinction between the right of the FDIC acting in its corporate capacity to assert the attorney-client privilege of the failed institution and the right of the FDIC acting as a receiver to assert the privilege. See FDIC v. Cherry, Bekaert & Holland, 129 F.R.D. 188, 191-92 (M.D. Fla. 1989); 12 U.S.C. § 1823(d)(3) (West 1989 and Supp. 1992). The SMI Industries case cited by GOCO involved the assignment of an asset, specifically intellectual property, outside of the context of an FDIC receivership; therefore, the case is inapposite.

Counsel for New West has also argued that the policy which underlies permitting New West to assert the attorney-client privilege of ASLA in this case is consistent with the federal policy which permitted New West to assert the D'Oench, Duhme doctrine in the Webb case. Webb, 225 Cal.App.3d at 1001, 275 Cal.Rptr. at 587. The D'Oench, Duhme doctrine is a federal common law doctrine of estoppel that precludes a notemaker from asserting the terms of an unwritten collateral agreement to avoid liability to the FDIC on the note that otherwise contains no conditions on its face. D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 62 S.Ct. 676 (1942).

In Webb, New West, as successor in interest to ASLA, was permitted to assert the D'Oench, Duhme doctrine as a defense to a notemaker's counterclaim for setoff based on an unwritten side agreement. The policy underlying the D'Oench, Duhme doctrine is to protect the FDIC and the public funds that it administers against misrepresentations as to the value of the securities or other assets in the portfolios of the banks which it insures or to which it makes loans. Id. at 457.

The Court in Webb elaborated on the policy underlying the doctrine. Purchase and assumption agreements are preferable to liquidation of an institution's assets because they minimize the FDIC's losses, expand the purchasing institution's opportunities at low risk, and protect depositors. Webb, 225 Cal.App.3d at 1001, 275 Cal.Rptr. at 587. Failure to extend the protection of D'Oench, Duhme to successors of failed institutions would undermine their effectiveness to continue the normal banking operations, thereby protecting the depositors and creditors of the failed institution. Id. Purchasers would otherwise be discouraged from acquiring the assets from the FDIC, and the FDIC would have greater difficulty protecting the assets of failed institutions. Id.

Similarly, New West argues, extension of the failed institution's attorney-client privilege to New West and to similarly-situated successors in interest encourages participation in purchase and

assumption transactions. With so many loans of failed institutions subjected to the risk of litigation, a prospective purchaser of assets would have little incentive to engage in a purchase and assumption transaction if it could not succeed to the attorney-client privilege of the failed institution. Judge Wilson in the Central District of California has previously addressed this issue with respect to the identical parties and has held that the FSLIC, American Savings, and New West may properly assert the attorney-client privilege of ASLA. In re Financial Corp. of America, 119 Bankr. at 736. Accord Christensen v. U.S. District Court for the Central District of California, 844 F.2d 694, 695-96 (9th Cir. 1988)(FSLIC succeeded to privileges of Beverly Hills Savings and Loan and is successor in interest for purpose of asserting claim for disqualification against savings and loan's former counsel).

Moreover, New West may properly bring the disqualification issue before the Court because any party in interest has standing to make an objection to a Section 327 application, In re Land, 116 Bankr. 798, 800 (D. Colo. 1990), and the Court may properly address the issue pursuant to the its authority to control the conduct of lawyers practicing before it. See Trone v. Smith, 621 F.2d 994, 999 (9th Cir. 1980).

B. Duty of Disclosure

Bankruptcy Code Section 327 and Bankruptcy Rule 2014, which set forth the eligibility requirements for the employment of professionals by the trustee or debtor in possession, include the requirement that the application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. Fed. R. Bankr. P. 2014(a). The duty to disclose is one of full, candid, and complete disclosure. In re B.E.S. Concrete Products, Inc., 93 Bankr. 228, 237 (Bankr. E.D. Cal. 1988)(failure to disclose representation of multiple nondebtor codefendants); In re Plaza Hotel Corp., 111 Bankr. 882, 883 (Bankr. E.D. Cal. 1990), aff'd, 123 Bankr. 466 (Bankr. 9th Cir. 1990)(failure to disclose that prepetition retainer was in fact arrangement designed to provide for postpetition payment). The duty of debtor's counsel to disclose all of its connections with the debtor, creditors, or other parties in interest whether it is apparent to counsel that there is an actual conflict is

settled law in the Ninth Circuit. In re Haldeman Pipe & Supply Co., 417 F.2d 1302, 1304 (9th Cir. 1969). All facts that may be pertinent to the court's determination of whether an attorney is disinterested or holds an adverse interest to the estate must be disclosed. Id. The existence of even an arguable conflict of interest must be fully disclosed pursuant to B.R. 2014 in plain view by counsel seeking eligibility for employment pursuant to Section 327, even if only to be explained away. In re McNar, Inc., 116 Bankr. 746, 751 (Bankr. S.D. Cal. 1990) (simultaneous representation of president of debtor, who was also a petitioning creditor, warranted reduction of fees).

The verified statement must set forth in affirmative terms the professional's relationship with the debtor and with creditors and with any other party in interest, and their respective counsel and accountants. In re Azevedo, 92 Bankr. 910, 911 (Bankr. E.D. Cal. 1988). The disclosure must be factual rather than conclusory, and mere assertions parroting the requirements of Section 327 are insufficient. Id. It is appropriate to set forth the required disclosures of any actual connections and then to close the verified statement as follows: "Except as set forth above, I have no connection with the debtor, creditors, or any other party in interest, their respective attorneys and accountants." Id. The Court finds that counsel's statement that he believes that the claims that are the subject of the litigation are not substantially related to the Bartko Firm's prior employment by ASLA is a conclusory statement.

The ultimate determination of whether there is a disqualifying conflict and whether the representation is in the best interest of the estate lies within the discretion of the court. That exercise of discretion must be independent and informed. In re B.E.S. Concrete Products, Inc., 93 Bankr. at 236. The failure to disclose frustrates the proper exercise of the Court's statutory duty to rule on the propriety of employment. The failure to disclose in this instance is misleading at best.

Counsel's failure to disclose in the Application its prior representation of ASLA in connection with the original GOCO loans constitutes defective disclosure. Defective disclosure is not a minor matter. It goes to the heart of the integrity of the bankruptcy system, of counsel, and of the courts. Appearances do matter. Even conflicts more theoretical than real should be scrutinized. In re B.E.S. Concrete Products, Inc., 93 Bankr. 228, 236 (Bankr. E.D. Cal. 1988). Negligent omissions do not vitiate the failure to disclose. Id. at 237. The Court also has the discretion to deny fees for the failure

to comply with the disclosure requirements of the Code. Id. Furthermore, counsel may be disqualified for failure to make the required disclosure. In re Hathaway Ranch Partnership, 116 Bankr. 208, 220 (Bankr. C.D. Cal. 1990)(failure to disclose prepetition transfer of house of debtor's general partner as retainer warranted disqualification).

C. Applicable Standard: Substantial Relationship Test Under California Law

1. Applicable Provisions

The Bartko Firm is seeking authority to be employed pursuant to Bankruptcy Code § 327(e), which provides:

> The trustee, with the Court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(e). This section is made applicable to the Debtor in Possession by Section 1107. The analysis of what constitutes an adverse interest begins with the applicable ethics rules for attorneys. In re McKinney Ranch Associates, 62 Bankr. 249, 253 (Bankr. C.D. Cal. 1986).

Local Rule 110-3 of the Northern District of California provides that the applicable standards of professional conduct for lawyers practicing in this district shall be those required of members of the State Bar of California and contained in the State Bar Act, the Rules of Professional Conduct of the State Bar of California, and the decisions of any court applicable thereto. L.R. 110-3. Thus, decisions under the California rules are directly controlling. In re California Canners and Growers, 74 Bankr. 336,, 342 (Bankr. N.D. Cal. 1987). Also, decisions under the ABA Model Rules of Professional Conduct provide useful guidance. Id. California courts have also looked to the ABA Model Code of Professional Responsibility to explicate and supplement the rules of professional responsibility governing lawyer conduct in this state. Haagen-Dazs Co., Inc. v. Perche No! Gelato, Inc., 639 F.Supp. 282, 285 (N.D. Cal. 1986).

Rule 3-310 of the California State Bar Rules of Professional Conduct (the "Rules of Professional

Conduct"), effective May 1989, provides in relevant part:

> (A) If a member has or had a relationship with another party interested in the representation, or has an interest in its subject matter, the member shall not accept or continue such representation without all affected clients' informed written consent.
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> . . .
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> (D) A member shall not accept employment adverse to a client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment except with the informed written consent of the client or former client.

Rule 1.9(a) of the ABA Model Rules of Professional Conduct (1983) provides:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

2. Similar or Related Factual Contexts

Thus, based on the rules governing attorney conduct, the applicable standard for the determination of disqualification is whether the former representation is "substantially related" to the current representation. Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980); Haagen-Dazs Co., Inc. v. Perche No! Gelato, Inc., 639 F.Supp. 282, 285 (N.D. Cal. 1986); Global Van Lines v. Superior Court of the State of California in and for the County of Orange, 144 Cal.App.3d 483, 488-89, 192 Cal.Rptr. 609, 612 (Cal.Ct.App. 1983). Substantiality is present if the factual contexts of the two representations are similar or related. Trone v. Smith, 621 F.2d at 998; Haagen-Dazs Co., Inc., 639 F.Supp at 285. The substantial relationship test does not require that the issues in the two representations be identical. Trone v. Smith, 621 F.2d at 1000.

In Trone v. Smith, the Ninth Circuit reversed the denial by the District Court of a motion to disqualify counsel, concluding that a substantial relationship existed between counsel's prior representation to determine the disclosures required in connection with a defendant's proposed secondary public offering and its subsequent representation of the debtor against that defendant, a former officer and director of the debtor, and others for breach of fiduciary duty. Trone v. Smith, 621 F.2d at 999-1000. The Court found that the scope of the prior legal work included counsel's review of corporate

structure and material contracts and transactions of the defendant. Id. at 997.

The relationship is measured by the allegations in the complaint and by the nature of the evidence that would be helpful in establishing those allegations. Trone v. Smith, 621 F.2d at 1000. Actions are substantially related if they involve similar legal issues and similar factual evidence. California Canners and Growers, 74 Bankr. at 346. In determining whether to disqualify counsel based on a substantial relationship between prior and current representation, a court should focus its inquiry on the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorneys' involvement with the cases. H. F. Ahmanson & Co. v. Salomon Brothers, Inc., 229 Cal.App.3d 1445, 1456, 280 Cal.Rptr. 614, 620 (Cal. Ct. App. 1991). As part of its review, the court should examine the time spent by the attorney on the earlier cases, the type of work performed, and the attorney's possible exposure to formulation of policy or strategy. Id.

3. The Appearance of Impropriety

Further, the test does not require the former client to show that actual confidences were disclosed. Trone v. Smith, 621 F.2d at 999; Haagen-Dazs Co., Inc., 639 F.Supp. at 285-86. It is the possibility of the breach of confidence, not the fact of the breach, that triggers disqualification. Id. An attorney must avoid even the appearance of impropriety. See Haagen-Dazs Co., Inc., 639 F. Supp. at 285.

The basis of the rule is the preservation of client secrets and confidences communicated to the lawyer by the client. Trone v. Smith, 621 F.2d at 998. It prevents a law firm from using confidential information obtained from the former client in the earlier representation against that client in the second representation. California Canners and Growers, 74 Bankr. at 345-46. When a substantial relationship has been shown to exist between the former representation and the current representation, and when it appears by virtue of the nature of the former representation or the relationship of the attorney to his former client that confidential information material to the current dispute would normally have been imparted to the attorney or to subordinates for whose legal work he was responsible, the attorney's knowledge of confidential information is presumed. Trone v. Smith, 621 F.2d at 998; Global Van Lines, 144 Cal.App.3d at 490, 192 Cal.Rptr. at 613. Accord People ex rel. Deukmejian v. Brown, 29 Cal.3d

150, 172 Cal.Rptr. 478, 624 P.2d 1206 (Cal. 1981). Once the attorney is found to be disqualified, both the attorney and his firm are disqualified from suing the former client. Trone v. Smith, 621 F.2d at 999.

4. Access to Policies, Practices and "Business Thinking"

Also relevant to the determination of disqualification of counsel are access to the former client's "business thinking," Haagen-Dazs Co., Inc., 639 F.Supp. at 286 (former in-house counsel had access to confidential information relating to issues underlying current litigation), and substantial knowledge of the policies, attitudes and practices of management of the former client acquired during the earlier representation. Global Van Lines, 144 Cal.App.3d at 490, 192 Cal.Rptr. at 613 (former counsel at time of acquisition of the property, i.e., stock, which is the subject of the current dispute).

In In re Canners and Growers decided in this district, Judge Carlson held that McCutchen, Doyle, Brown & Eversen ("McCutchen") was disqualified from representing the debtor in a fraud and breach of contract case against several banks, including Bank of America, because of its substantial relationship to McCutchen's representation of Bank of America in several other unrelated lawsuits for fraud, breach of contract, and breach of fiduciary duty involving the bank's loan practices in the agricultural industry. California Canners and Growers, 74 Bankr. at 346. McCutchen had also failed to properly disclose the conflict to Bank of America, and Bank of America had not waived the conflict by consenting to McCutchen's general representation of the debtor.

Although the issues and the evidence in the two representations would not be identical, Judge Carlson found that a substantial relationship exists if the legal issues and the factual evidence are similar. Id. These actions were expected to raise similar issues and require the examination of the same bank officers as witnesses. Of particular relevance and also determinative in this case was McCutchen's access to the "business thinking" of Bank of America, which had freely provided information to McCutchen in connection with the defense of these agricultural cases.

D. APPLICATION OF THE STANDARD TO THE FACTS IN THIS CASE

Although the complaints in the State Court Actions are framed to be based on the 1986 and 1987 restructured loan and the 1991 Memorandum of Understanding, the relationship between GOCO and

ASLA (and New West) is at the heart of the issues in the State Court Actions, and the Bartko Firm served as real estate counsel to ASLA at the inception of that relationship. Even the controlling principal of the debtor believes in the relevance of the relationship between the parties during the period that the Bartko Firm represented ASLA. Not only is it conceivable, it is probable that an actual conflict will arise in connection with the Bartko Firm's current representation of GOCO in the State Court Actions. During the period of its substantial representation of ASLA, the Bartko Firm assisted ASLA in developing strategies regarding the sale of its REO property, as is reflected in the Bartko Firm's time records. It was also privy to ASLA's business thinking and had substantial knowledge of the policies, attitudes, and practices of ASLA's management, some of whom were still present at the time of the 1986 and 1987 loan restructure. The amount of fees earned by the Bartko Firm from its representation of ASLA and a review of some of its time records and the loan agreements, deeds of trust, assignments of rents and leases, agreements of purchase and sale and joint escrow instructions generated by the Bartko Firm in connection with its representation of ASLA indicate that its representation was extensive and required an intimate knowledge of ASLA's lending philosophy. Under the circumstances, the Bartko Firm's possession of confidential information acquired from its representation of ASLA and relevant to the State Court Actions is presumed. The discovery requests propounded to date in one of the State Court Actions include requests for information that pre-dates the 1986 and 1987 loan restructure.

The Bartko Firm also presumably had access to New West's confidential information as recently as 1991 when it represented Mr. Fluetsch as a codefendant in lender liability actions. Although the Bartko Firm would have the Court believe that Mr. Fluetsch's interests were diametrically in conflict with those of New West, the codefendants also shared a unity of interests that likely would have given the Bartko Firm access to New West's lending practices through the firm's client, Mr. Fluetsch.

The Applicant has not cited any authority for its contention that the mere passage of time would cure the apparent conflict, which is, in fact, not an incurable conflict. The Court would not have been as troubled with the proposed representation if the Bartko Firm had acquired the informed, written consent of New West for its representation of the Debtor in the State Court Actions. The Applicant has not urged, and this Court does not perceive, grave prejudice to the Debtor if this Application is denied, insofar as there are other qualified litigation firms, and the State Court Actions are still in the early stages

of the litigation between these parties.

CONCLUSION

Based upon the existence of a substantial relationship between the Bartko Firm's prior representation of ASLA and its current representation of GOCO in the State Court Actions, as well as the firm's failure to adequately disclose to this Court the nature of its prior representation, the Application for Authorization to Employ the Bartko Firm as Special Counsel is denied. In light of the disqualification of the Bartko Firm, this Court grants a stay of discovery in the litigation commenced by GOCO for 30 days while GOCO retains new counsel.